

THE HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANTZ SAMSON, a Washington resident,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

UNITED HEALTHCARE SERVICES, INC.,

Defendant.

NO. 2:19-cv-00175-JLR

**UNITED HEALTHCARE SERVICES
INC.'S MOTION TO STAY PENDING
THE U.S. SUPREME COURT'S
DECISION IN *BARR V. AMERICAN
ASSOCIATION OF POLITICAL
CONSULTANTS*, OR, ALTERNATIVELY,
TO DISMISS, TRANSFER, OR STAY
UNDER THE FIRST-TO-FILE RULE**

**NOTE ON MOTION CALENDAR:
MAY 1, 2020**

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1 United HealthCare Services, Inc. (United) respectfully moves to stay this case until the
 2 Supreme Court decides *Barr v. American Association of Political Consultants, Inc.*, No. 19-631,
 3 *cert. granted*, Jan. 10, 2020. United alternatively moves to dismiss, transfer, or stay under the
 4 first-to-file rule.

5 FACTUAL BACKGROUND

6 **I. The Supreme Court may invalidate the TCPA provision underlying Plaintiff's** 7 **only claim.**

8 Earlier this year, the U.S. Supreme Court granted certiorari to review the
 9 constitutionality of the TCPA's cell phone restriction, 47 U.S.C. § 227(b)(1)(A)(iii)—the same
 10 provision on which Plaintiff bases his claim. *Compare Barr v. Am. Ass'n of Political*
 11 *Consultants, Inc.*, No. 19-631, SCOTUSblog, [https://www.scotusblog.com/case-files/cases/barr-](https://www.scotusblog.com/case-files/cases/barr-v-american-association-of-political-consultants-inc/)
 12 [v-american-association-of-political-consultants-inc/](https://www.scotusblog.com/case-files/cases/barr-v-american-association-of-political-consultants-inc/) (cert. granted on January 10, 2020), *with*
 13 *Samson Am. Compl.* ¶¶ 5.2, 7.1 (pleading cell phone claim under § 227(b)(1)(A)(iii)), *and* ECF
 14 No. 69. The constitutionality of the cell phone restriction is at issue because two circuits held
 15 that a content-based exception within § 227(b)(1)(A)(iii) (for calls made to collect federal
 16 government debt) violates the First Amendment. *See Duguid v. Facebook, Inc.*, 926 F.3d 1146,
 17 1153-56 (9th Cir. 2019); *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 167-68
 18 (4th Cir. 2019).

19 Respondents argue that the TCPA's cell phone restriction is invalid. *See Br.* for
 20 Respondents at 33–51 (Mar. 25, 2020). And they are likely to prevail if history is any guide.
 21 When the Court grants certiorari, it reverses approximately 73 percent of the time. *See, e.g.,*
 22 Hon. Timothy B. Dyk, *Thoughts on the Relationship Between the Supreme Court and the*
 23 *Federal Circuit*, 16 Chi.-Kent J. Intell. Prop. 67, 72 (2016). This reversal rate is even higher
 24 where, as here, there is no circuit split. *See, e.g.,* Stephen L. Wasby, *How the Ninth Circuit*
 25 *Fares in the Supreme Court: The Intercircuit Conflict Cases*, 1 Seton Hall Circuit Rev. 119, 128
 26 (2005).

II. *Matlock, Humphrey, and Samson: Three overlapping TCPA cell phone cases against United.*

In 2013, a plaintiff brought a case against United that seeks to certify a nationwide class of all people “who received any telephone call/s” from United to their “cellular telephone made through the use of any automatic telephone dialing system or with an artificial or prerecorded voice.” Decl. of Maxwell V. Pritt (Pritt Decl.), Ex. A, Compl. ¶ 24, *Matlock v. United HealthCare Servs., Inc.*, No. 13-cv-2206, ECF No. 2 (E.D. Cal. Oct. 22, 2013). That case is currently stayed. Minute Order, *Matlock*, No. 13-cv-2206, ECF No. 59 (Oct. 29, 2019). Before it was stayed, however, the *Matlock* court consolidated a later-filed case, *Humphrey v. United HealthCare Services, Inc.*, No. 2:14-cv-01792 (E.D. Cal.), which had been transferred from the Northern District of Illinois. See *Humphrey v. United HealthCare Services, Inc.*, No. 14-cv-1157 (N.D. Ill.). In *Humphrey*, the “[p]laintiff seeks to represent a class of consumers who was called by United Healthcare using an artificial or pre-recorded voice without the consent of the called party.” Pritt Decl., Ex. B, *Humphrey* Compl. ¶ 20, No. 13-cv-2206, ECF No. 48 (Feb. 28, 2014).

Similarly, in this case, Samson seeks to certify a nationwide class of “[a]ll persons or entities in the United States who, on or after four years before the filing of this action, received a call to their cellular telephone line with a pre-recorded message, made by or on behalf of Defendant.” Compl., ¶ 7.1. Samson alleges United called his cell phone with pre-recorded messages intended for others. *Id.*, ¶ 12. Those people are United members or others who consented to United’s calls, and who rely on those calls to understand, use, and maintain their healthcare coverage.

Plaintiff has taken discovery of three United teams that make outbound calls. But his putative class is not limited by team. Rather, it would include dozens of teams that place many types of calls intended for United’s 45 million members who have many different health care needs. The parties agreed to stay discovery and motion practice pending an ongoing and

1 productive mediation. *See* Order Extending Case Deadlines to Allow Mediation, ECF No. 69
 2 (Dec. 31, 2019).

3 Plaintiff nonetheless informed United that he intends to move in the near future to amend
 4 his complaint. United's understanding is that Plaintiff's amended complaint will delete the
 5 putative class in the Complaint and seek to certify two new nationwide classes: (1) a "re-
 6 assigned number" class of people who were assigned a number that previously belonged to a
 7 United member (the "Reassigned Number Class"); and (2) a class of people who United called
 8 after they asked not to be called (the "Do Not Call Class"). These proposed putative classes
 9 differ drastically from the class alleged in the Complaint on which discovery has been based,
 10 and are defined to include calls that are subsumed by the putative classes alleged in *Matlock* and
 11 *Humphrey*.

12 ARGUMENT

13 **I. At a minimum, the Court should stay this case pending the U.S. Supreme Court's** 14 **decision on whether to invalidate the TCPA's cell phone restriction in its entirety.**

15 United respectfully requests that the Court stay this case pending the Supreme Court's
 16 impending decision in *Barr v. American Association of Political Consultants*, No. 19-631. That
 17 decision likely will void the TCPA's cell phone restriction—and with it, Plaintiff's only
 18 remaining claim in this case.¹ As discussed below, courts in this District and Circuit (including
 19 this Court) have stayed TCPA cases for far less. *See, e.g., Lennartson v. Papa Murphy's*
 20 *Holdings, Inc.*, 2016 WL 51747, at *5 (W.D. Wash. Jan. 5, 2016); *Kwan v. Clearwire Corp.*,
 21 2011 WL 1213176, at *3 (W.D. Wash. Mar. 29, 2011) (Robart, J.); *Eric B. Fromer Chiropractic,*
 22 *Inc. v. New York Life Ins. & Annuity Corp.*, 2015 WL 6579779, at *2 (C.D. Cal. Oct. 19, 2015)
 23 (staying TCPA case and collecting five other cases that were stayed pending a Supreme Court
 24 decision).

25
 26
 27 ¹ Plaintiff dismissed his two Washington state claims on December 31, 2019. *See* Dkt.
 68.

Three factors inform whether to stay this case pending a Supreme Court decision: “[A] the hardship or inequity that a party may suffer in being required to go forward; [B] the possible damage that may result from granting a stay; and [C] the orderly course of justice ‘measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.’” *Kwan*, 2011 WL 1213176, at *2 (quoting *CMAX, Inc. v. Hall*, 300 F.3d 265, 268 (9th Cir. 1962)). All three factors support staying this case.

A. Denying a stay pending the U.S. Supreme Court’s decision will prejudice United.

The hardship and inequity United will suffer if this case is required to go forward pending *American Association of Political Consultants* is more than sufficient to justify a stay. Indeed, this Court has stayed other TCPA cases to await Supreme Court decisions when they involved a lower probability of a decision in the defendant’s favor, and a lower impact of such a decision.

In *Kwan*, there was a “significant possibility” that Plaintiff’s claims would “turn on the Supreme Court’s opinion” in the then-pending *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). 2011 WL 1213176, at *3. This Court reasoned that *Concepcion* could limit—but not eliminate—discovery. That was enough to justify a stay, because “[t]he burdens associated with discovery in a putative class action are substantially greater than in an individual arbitration.” *Id.* It was immaterial that the deadline for plaintiff’s motion for class certification was only a week away. *See id.* at *1 (April 7 deadline for class certification motion; stay issued on March 29).

In *Lennartson*, 2016 WL 51747, at *4–5, the Court stayed plaintiff’s TCPA case for the then-pending *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The Court conceded that even if *Spokeo* came down in defendant’s favor, the plaintiff would still have standing (and thus a TCPA claim). *Id.* at *5. Yet the Court stayed the case because “*Spokeo* could simplify or complicate

1 the class certification process. For example, it could limit the size of Lennartson’s putative class
 2” *Id.*

3 Here, the impact of a favorable decision is much greater than in *Kwan* or *Lennartson*. If
 4 the Supreme Court invalidates the TCPA’s cell phone restriction, Plaintiff’s sole claim will *fail*
 5 *in its entirety*. Plaintiff does not—and cannot—allege any other violation of the TCPA, because
 6 he was called only on his *cell phone*. Compl., ¶ 1.1. And even if he had been called on a
 7 landline, those calls would not be TCPA violations under regulations that shield non-commercial
 8 calls (including healthcare calls) to *non-cellular* lines. *See TCPA Rules and Regulations*, 7 FCC
 9 Rcd. 8752, 8782 (1992); *accord* 47 C.F.R. § 64.1200(a)(3)(ii) (non-commercial), (v) (health care
 10 message).

11 In addition, it is likely the Supreme Court will strike down the TCPA’s cell phone
 12 restriction in *American Association of Political Consultants*. Certiorari statistics and the Court’s
 13 First Amendment law make this clear. When the Court grants certiorari, it reverses about 73
 14 percent of the time. *See, e.g., Dyk, supra*, at 72. This reversal rate is even higher where, as
 15 here, there is no circuit split. *See, e.g., Wasby, supra*, at 128; *see also Duguid*, 926 F.3d at 1156
 16 (following the Fourth Circuit and severing the TCPA cell phone restriction’s government debt
 17 exception). So the Supreme Court is likely to reverse in *American Association of Political*
 18 *Consultants*.

19 Reversal entails either saving the TCPA’s cell phone restriction in its entirety—
 20 government debt exception and all—or invalidating it entirely. The former is highly unlikely, as
 21 it would repudiate the Supreme Court’s recent First Amendment jurisprudence, which subjects
 22 to fatal strict scrutiny any restriction on speech that “draws distinctions based on the message a
 23 speaker conveys.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). The TCPA’s cell
 24 phone restriction does just that. It bans calls to cell phones unless they are “made solely to
 25 collect a debt owed to or guaranteed by the United States.” 47 U.S.C. § 227(b)(1)(A)(iii). Its
 26 applicability “thus depend[s] entirely on the communicative content of the [call].” *Reed*, 135 S.
 27 Ct. at 2227; *see also McCullen v. Coakley*, 573 U.S. 464, 479 (2014). And striking the cell

1 phone restriction would mirror the Court’s treatment of other content-based speech restrictions.
 2 *See, e.g., Reed*, 135 S. Ct. at 2224, 2227 (striking down entire “provisions” for being content-
 3 based, not just severing unconstitutional “exemptions”); *Arkansas Writers’ Project, Inc. v.*
 4 *Ragland*, 481 U.S. 221, 232, 234 (1987) (same); Br. for Respondents 33–50 (discussing caselaw
 5 in depth).

6 Moving forward with this case now will require United to divert substantial resources
 7 and employee time from providing healthcare services to members and coordinating responses
 8 to the COVID-19 global pandemic, to engaging in further internal investigation, discovery, and
 9 motion practice in this case, including expert depositions and class certification. *See* Decl. of
 10 Ryan C. Wong ¶¶ 2–13. These costs are not recoverable even after the Supreme Court strikes
 11 down the TCPA’s cell phone provision in the coming months. Accordingly, the first stay factor
 12 urges this Court to wait for the Supreme Court’s decision in *American Association of Political*
 13 *Consultants*.

14 **B. Granting a stay will not prejudice Plaintiff because it will be brief, he**
 15 **does not seek immediate judicial intervention, and he does not allege**
 16 **a continuing violation.**

17 A stay will not prejudice Plaintiff for at least three reasons. First, whether Plaintiff can
 18 proceed with his case will be decided soon. The Supreme Court granted certiorari in *American*
 19 *Association of Political Consultants* on January 10, 2020, and the case will be fully briefed this
 20 month. Argument was scheduled for April 22, but the Supreme Court delayed oral argument
 21 temporarily for all cases remaining cases on its calendar due to the COVID-19 emergency. *See*
 22 U.S. Supreme Court, Press Release Regarding Postponement of April Oral Arguments (Apr. 3,
 23 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20. The Court
 24 advised that it:

25 will consider rescheduling some cases from the March and April
 26 sessions before the end of the Term, if circumstances permit in
 27 light of public health and safety guidance at that time. The Court
 will consider a range of scheduling options and other alternatives if
 arguments cannot be held in the Courtroom before the end of the
 Term.

1 *Id.* Thus, there is still a substantial chance that the decision in *American Association of Political*
 2 *Consultants* will be handed down by the end of this term, which is typically in late June or early
 3 July. See *Supreme Court Procedures*, [https://www.uscourts.gov/about-federal-](https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1)
 4 [courts/educational-resources/about-educational-outreach/activity-resources/supreme-1](https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1). Even if
 5 COVID-19 were to defer the decision to the end of *next* term, that would be a delay of a “year or
 6 so”—which would still support a stay. *Centeno v. Inslee*, 310 F.R.D. 483, 491 (W.D. Wash.
 7 2015) (granting defendant’s motion to stay case in September—more than nine months before
 8 the end of the term—given the then-pending *Friedrichs v. California Teachers Ass’n*, 136 S. Ct.
 9 1083 (2016)); see also *Eric B. Fromer Chiropractic*, 2015 WL 6579779, at *2 (collecting five
 10 cases in which the district court issued stays in June or July because of Supreme Court cases
 11 scheduled for *next* term—such as *Spokeo*, which the Court decided about 11 months after those
 12 stays).

13 Second, Plaintiff does not seek immediate judicial intervention in this case. Rather,
 14 Plaintiff filed his complaint in January 2019 and has stipulated to case management extensions.
 15 And for the past few months he has agreed to stay discovery and pursue mediation, which is
 16 ongoing. He cannot simultaneously pursue these goals while claiming a brief pause in litigation
 17 will harm him.

18 Finally, Plaintiff does not allege a continuing TCPA violation. He allegedly received his
 19 last unlawful call in January 2019. Compl., ¶ 6.7. Accordingly, this brief stay will not prejudice
 20 Plaintiff.

21 **C. Granting a temporary stay will promote the orderly course of justice**
 22 **in this case.**

23 A stay will promote the orderly course of justice. This Court held that a stay furthers
 24 justice where “[a]rguably, the Supreme Court’s decision in [the pending case] will simplify the
 25 present issue in this case.” *Kwan*, 2011 WL 1213176, at *3 (internal quotation marks omitted).
 26 This Court also recognized that a stay is especially important in freedom of speech cases, where
 27

1 “a stay will facilitate guidance by the ultimate arbiter of the First Amendment.” *Centeno*, 310
2 F.R.D. at 491.

3 As discussed above, the Supreme Court will “arguably”—if not likely—invalidate the
4 TCPA’s cell phone provision, and thus Plaintiff’s remaining cause of action, in *American*
5 *Association of Political Consultants*. That would of course “simplify the present issue in this
6 case.” A stay will also “facilitate guidance by the ultimate arbiter of the First Amendment,” the
7 Supreme Court, because one of the questions presented in *American Association of Political*
8 *Consultants* is “[w]hether the government-debt exception to the TCPA’s automated-call
9 restriction violates the First Amendment.” Question Presented, *Barr v. Am. Ass’n Pol.*
10 *Consultants*, No. 19-631, [https://www.supremecourt.gov/docket/docketfiles/html/qp/19-](https://www.supremecourt.gov/docket/docketfiles/html/qp/19-00631qp.pdf)
11 [00631qp.pdf](https://www.supremecourt.gov/docket/docketfiles/html/qp/19-00631qp.pdf) (cert. granted Jan. 10, 2020). For both of these reasons, “[l]ittle advantage to
12 proceeding with discovery and motions practice in the interim exists.” *Lennartson*, 2016 WL
13 51747, at *5.

14 In sum, given the prejudice to United if a stay is denied, the lack of prejudice to Plaintiff
15 if one is granted, and the importance of a stay in promoting an orderly course of justice, the
16 Court should stay this case pending the Supreme Court’s decision in *American Association of*
17 *Political Consultants*.

18 **II. Alternatively, the Court should dismiss, transfer, or stay this case under the**
19 **first-to-file rule.**

20 If the Court declines to stay this case pending *American Association of Political*
21 *Consultants*, then it should dismiss, transfer, or stay the case under the first-to-file rule. The
22 “rule is a ‘generally recognized doctrine of federal comity’ that urges the Court to transfer, stay,
23 or dismiss an action if a case with substantially similar issues and parties was previously filed in
24 another district court.” *Pars Equality Ctr. v. Pompeo*, 2018 WL 6523135, at *3 (W.D. Wash.
25 Dec. 12, 2018) (Robart, J.) (quoting *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94 (9th
26 Cir. 1982)). The rule “alleviate[s] the burden placed on the federal judiciary by duplicative
27 litigation” and “prevent[s] the possibility of conflicting judgments.” *Id.* (quoting *Wallerstein v.*

1 *Dole Fresh Vegetables, Inc.*, 967 F. Supp. 2d 1289, 1292 (N.D. Cal. 2013)). Thus, it “should not
2 be disregarded lightly.” *Id.* (quoting *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625
3 (9th Cir. 1991)).

4 A three-factor test informs whether the first-to-file rule should be applied: “[A] the
5 chronology of the actions; [B] the similarity of the parties; and [C] the similarity of the issues.”
6 *Id.* at *3 (quoting *Kohn Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1240
7 (9th Cir. 2015)). “Notwithstanding these specific factors, the first-to-file rule ‘is not a rigid or
8 inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates
9 of sound judicial administration.’” *Id.* (quoting *Decker Coal Co. v. Commonwealth Edison Co.*,
10 805 F.2d 834, 844 (9th Cir. 1986)). All three factors support dismissing, transferring, or staying
11 this case.

12 **A. *Matlock* and *Humphrey* predate *Samson*’s complaint by more than**
13 **five years.**

14 The first factor is the chronology of the cases. The first-filed cases similar to *Samson* are
15 two consolidated putative class actions pending in the U.S. District Court for the Eastern District
16 of California, *Matlock v. United HealthCare Services, Inc.* and *Humphrey v. United Healthcare*
17 *Services, Inc.* *Matlock* filed his complaint on October 22, 2013—more than five years before
18 *Samson* did—claiming that United called his cell phone in violation of the TCPA. *See* Pritt
19 Decl., Ex. A, *Matlock* Compl. ¶¶ 13–24, No. 13-cv-2206, ECF No. 2. And *Humphrey* filed his
20 complaint on February 18, 2014—nearly five years before *Samson* did—also claiming the same.
21 *See* Pritt Decl., Ex. B, *Humphrey* Compl. ¶¶ 5–6, 17, No. 13-cv-2206, ECF No. 48. The timing
22 of these filings weighs heavily in favor of applying the first-to-file rule. *See, e.g., Pars Equality*
23 *Ctr.*, 2018 WL 6523135, at *4 (applying rule given that first-filed case pre-dated similar case by
24 four months).

25 **B. *Matlock/Humphrey* and *Samson* involve substantially similar parties.**

26 The second factor is similarity of the parties. The sole defendant in the putative class
27 actions in both courts is United. With respect to the plaintiffs, “[i]n the context of class actions,

1 a court should compare the putative classes, rather than the named plaintiffs, to determine
 2 whether the classes encompass at least some of the same individuals.” *Pars Equality Ctr.*, 2018
 3 WL 6523135, at *5. As explained above, the types of calls in *Matlock* (all calls regardless of
 4 whether or not they were pre-recorded) and *Humphrey* (all pre-recorded calls) subsume the types
 5 of calls at issue in both the current and the proposed putative classes in *Samson*. In particular,
 6 the *Matlock* putative class encompasses all of the other putative classes, including in this case,
 7 and includes all calls whether they were pre-recorded, made with an autodialer, or made without
 8 consent.

9 **C. *Matlock/Humphrey* and *Samson* raise substantially similar issues.**

10 The third first-to-file factor is similarity of the issues between this case and the first-filed
 11 case. Again, only substantial similarity is needed. *Pars Equality Ctr.*, 2018 WL 6523135, at *6.
 12 But here, *all* of the issues in this case are also at issue in *Matlock* and *Humphrey*. Each case
 13 alleges that United violated the same TCPA cell phone provision. *See* Pritt Decl., Ex. A, *Matlock*
 14 Compl. ¶¶ 13, 26; Pritt Decl., Ex. B, *Humphrey* Compl. ¶ 22; *Samson* Compl., Dkt. 1, ¶¶ 5.2,
 15 8.3. And each involves calls addressed to (and intended for) a United member, not the plaintiff.
 16 *See* Pritt Decl., Ex. A, *Matlock* Compl. ¶ 21; Pritt Decl., Ex. B, *Humphrey* Compl. ¶ 6; *Samson*
 17 Compl., Dkt. 1, ¶ 6.12. Moreover, each case seeks treble damages for willful or knowing
 18 violations plus injunctive relief. *See* Pritt Decl., Ex. A, *Matlock* Compl. ¶¶ 46–48; Pritt Decl.,
 19 Ex. B, *Humphrey* Compl. ¶¶ 30, Prayer for Relief at b; *Samson* Compl., Dkt. 1, ¶¶ 9.3, Prayer
 20 for Relief at D.

21 This similarity of issues means discovery will overlap. And because discovery in TCPA
 22 cases is substantial and expensive, undergoing discovery twice on overlapping putative classes
 23 will waste resources and possibly result in different sets of discovery based on conflicting court
 24 orders. And while the parties in this case have engaged in discovery, thus far it has been limited
 25 primarily to only a few United teams and their outbound dialing campaigns that included
 26 Plaintiff’s number. But Plaintiff intends to seek leave to amend his complaint and to move to
 27

1 Dated: April 8, 2020

By: /s/ Maxwell V. Pritt

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8 Dated: April 8, 2020

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